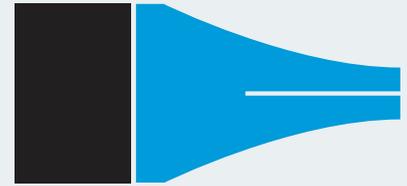


Discretionary trusts and landholder duty: part 2

by Denise Tan, ATI, Sladen Legal



Unexpected landholder duty liabilities can arise when land held by discretionary trusts are deemed to be held by landholders.

Part 1 of this article (which is published in the February issue of this journal) introduced the often overlooked duty provisions which deem lands held under discretionary trusts to be held by a beneficiary of such a trust, who is either a landholder or linked entity of such a landholder.

Part 1 of this article then proceeded to explore the various requirements and guidance set out by the different state and territory authorities to assist in interpreting these provisions, with a focus on New South Wales, the Australian Capital Territory, Victoria and Tasmania.

Part 2 of this article examines the unexpected duty liabilities that can arise as a result of these provisions by looking at the differences between these provisions in Western Australia, the Northern Territory, South Australia and Queensland. In addition, this part will examine ways to ensure that these deeming rules do not inadvertently apply.

When will discretionary trust land be deemed to be held by a landholder?

Western Australia

Section 158 of the *Duties Act 2008* (WA) is similar in principle to New South Wales, the Australian Capital Territory, Victoria and Tasmania. Like Victoria and Tasmania, the Western Australia provisions allow the Commissioner to determine, in light of what would not be inequitable, the percentage of interest in the discretionary trust's property that should be deemed to be held by a beneficiary (ie landholder corporate entity or linked entity) of the discretionary trust.

The Western Australia Office of State Revenue (WA OSR) has provided the most guidance of all Australian jurisdictions in relation to these deeming rules, listing the

factors that the Commissioner will consider in Commissioner's Practice DA 41.0.

The WA OSR's position is that it will typically deem an entity's interest in a discretionary trust to remain at 100% if:

- the acquisition in the landholder does, will or may result in a change of beneficial ownership or control of the discretionary trust; and
- duty has not been assessed on the change of beneficial ownership or control of the discretionary trust property as a trust acquisition or surrender, or a disposition of shares in a corporate trustee.

On the contrary, the WA OSR may reduce the deemed interest of an entity in a discretionary trust's land (to below 100%, but not 0%) where:

- the trustee has limited discretion to distribute property of the trust to potential beneficiaries (ie in circumstances where the distribution of capital has been specified in set proportions, with only a full discretion as to the distribution of the income of the trust); and
- multiple beneficiaries of the discretionary trust are linked entities and the Commissioner is satisfied that the acquirer of the landholder has gained the ability to control the discretionary trust. In such a case, the likely outcome is that each beneficiary will be seen to have an equal interest with the sum of interests being 100%. A discretion would be exercised to ensure that the sum of interests in the trust does not exceed 100%.

When considering whether an entity's interest in a discretionary trust should be less than 100%, the WA OSR would consider all facts and circumstances. While

some factors considered overlap with those identified in the Victorian Revenue Ruling DA.059, additional factors include:

- if the entity is an expressly named beneficiary or if it fell within a class of beneficiaries described in the trust deed (eg a corporation of which a named beneficiary is a member);
- whether the entity's position as a discretionary object of the trust is related to the relevant acquisition of the landholder in question (ie if the acquisition occurred so the acquirer could gain control of the discretionary trust);
- whether the entity will remain a potential beneficiary of the trust after a relevant acquisition in a landholder;
- the nature of the relationship the main entity or linked entity has with the discretionary trust, including whether there are any loan arrangements;
- the trustee of the discretionary trust's discretion and limitation in distributing capital or income of the trust; and
- whether the acquirer of the landholder in question gains any economic benefits from the discretionary trust's property without acquiring an interest in the property.

Clear circumstances in which the WA Commissioner will usually exercise the discretion to reduce an entity's interest in a discretionary trust to 0% include where:

- an entity has not benefited and is unlikely to benefit from the trust;
- neither the landholder nor any linked entity controls the trust; and
- the acquisition of the landholder does not result in any change of beneficial ownership or control of the discretionary trust.

Northern Territory

Section 56C(7) of the *Stamp Duty Act* (NT) provides that the entitlement of an entity on the distribution of a discretionary trust shall be determined as the greatest entitlement that the entity could derive at any time from the trust (either directly from the trust or through another trust). Ascertaining the greatest entitlement that an entity could derive at any time from the trust includes looking at whether there is a fulfilment of a condition, an outcome of a contingency, or the exercise of a power or discretion. This query focuses in particular on whether an entity may ultimately benefit from the trust's underlying property. For most trusts, each beneficiary can receive up to 100% of the trust property — in that case, this section would deem a beneficiary that is a landholder (for example, a corporate beneficiary) to hold 100% of the trust's real estate.

It is noted that the Northern Territory Commissioner has broad powers to determine that such part of a property held in a discretionary trust is held or is not held by a corporate beneficiary of the discretionary trust for landholder duty purposes.

South Australia

Section 91(3) of the *Stamp Duties Act 1923* (SA) provides that a relevant entity or other person that is object of a discretionary trust is beneficially entitled to the trust property. The South Australian Commissioner may determine that a relevant entity is not regarded as beneficially entitled to the trust property if the deeming provision operates unreasonably.

In Revenue SA's *Stamp Duty land holder guide to legislation 2018*, the Commissioner clarifies that the intention of the legislation is to provide an ability to look through and trace direct and indirect interests through discretionary trusts to avoid blocking the aggregation of interests of a person in a landholding entity or its subsidiary where the notional interests in South Australian land are placed in a discretionary trust. The onus remains on the taxpayer to satisfy the Commissioner that the deeming provision operates unreasonably.

Queensland

The operation of duty on trust interests and the landholder duty provisions in Queensland are unique and differ to all other state and territories. First, the landholder regime does not apply to private unit trusts (as they are covered by

Queensland's unique trust acquisition/surrender model¹).

Second, rather than deeming the land of the discretionary trust to be the land of the landholder, s 166 of the *Duties Act 2001* (Qld) deems the trustees of trusts to be subsidiaries of a landholder where either the landholder or a subsidiary is a beneficiary of that trust.²

Third, if a deemed "subsidiary trust" holds 50% or more of the shares in another company, then that company will also be deemed to be a subsidiary of the landholder.³

Fourth, the term "beneficiary" is not legislatively defined in the Queensland legislation. This creates another layer of ambiguity in relation to how the provisions operate, especially in relation to contingent beneficiaries.

The legislation operates broadly to treat such lands as landholdings of the landholder⁴ and, for the purposes of identifying a landholder under the \$2m land threshold test, the value of all land held by the trustee would be included regardless of any final deemed proportion held.⁵ Only on calculating the dutiable value of a relevant acquisition would the entitlements on termination of the discretionary trust become a relevant consideration.⁶

How to ensure that the deeming rules do not inadvertently apply

In order to ensure that the deeming rules do not inadvertently apply to deem a discretionary trust's land as being held by a beneficiary (that is, a landholder and/or subsidiary of a landholder), prior to a relevant acquisition in a landholder, taxpayers should consider undertaking the following measures:

- conducting a detailed review of the relevant corporate structure to identify the landholder and subsidiaries and/or linked entities of the landholder that may be potential beneficiaries of discretionary trusts that hold land;
- preparing deed(s) to exclude the landholder/linked entity beneficiaries as a beneficiary of the discretionary trust(s); and/or
- making an application to the appropriate Commissioner to ascertain a beneficiary's entitlement to a trust's land or for a discretion to be exercised to exclude the landholdings of the discretionary trust(s).

Conclusion

With more taxpayers falling within the landholder duty regimes, the nuances of landholder duty regimes and their application will become increasingly relevant.

As outlined in this article, it is important to remember that the provisions provide for the deeming of lands held by beneficiaries of discretionary trusts to also form part of a landholder's landholdings (either held directly by a beneficiary that is landholder or a linked entity).

While the core purpose of these provisions is anti-avoidance in nature, in general, the provisions operate automatically (ie without any requirement for an avoidance purpose), leaving affected taxpayers with the obligation to seek the relevant Commissioner's discretion to exclude discretionary trust land in whole or in part.

Whether the Commissioner will exercise such a discretion is assessed on a range of factors.

Consequently, any acquisitions in landholder entities and related corporate structures must be carefully assessed in light of any discretionary trust landholdings and partnership arrangements to ascertain the correct duty exposure.

If the deeming rules will apply, taxpayers could consider pre-emptive action, such as excluding landholders as beneficiaries of the discretionary trust(s) or making an application to the relevant revenue authorities to exclude the landholdings of the discretionary trust.

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References

- 1 See Pt 8 of Ch 2 of the *Duties Act 2001* (Qld), which specifically imposes separate duty on trust acquisitions and surrenders of trust interests. To illustrate, where an acquisition in a landholding listed unit trust is subject to transfer duty under both the trust acquisition and landholder provisions, ss 82 and 186 of the *Duties Act 2001* (Qld) should operate to ensure that double duty is not imposed by providing a reduction of duty where either landholder duty or transfer duty on the trust acquisition has been paid.
- 2 S 166(2)(a) of the *Duties Act 2001* (Qld).
- 3 S 166(2)(b) of the *Duties Act 2001* (Qld).
- 4 S 167 of the *Duties Act 2001* (Qld).
- 5 S 170 of the *Duties Act 2001* (Qld).
- 6 S 182(3)(c) of the *Duties Act 2001* (Qld) provides that this may be determined in light of the greatest proportion of the unencumbered value of the landholdings in Queensland of the trust that the landholder could derive at any time from the trust without regard to the liabilities of any of the subsidiaries.